EX PARTE OR LATE FILED

Building The Wireless Future™

August 9, 1995

CTIA
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
202-785-0081 Telephone
202-785-0721 Fax
202-736-3256 Direct Dial

Randall S. Coleman
Vice President for Regulatory Policy and Law

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: ***Ex Parte* Presentation**
RM-8577

Dear Mr. Caton:

On August 9, 1995, Messrs. Brian F. Fontes and Randall S. Coleman, representing the Cellular Telecommunications Industry Association ("CTIA"), met with Ms. Regina Keeney and Messrs. Laurence Atlas and Michael Wack of the Commission's Wireless Telecommunications Bureau. The matters discussed are reflected in CTIA's written submissions on file in the above-referenced matter. The attached information was distributed to those present.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Randall S. Coleman

Attachments

there was a great concern among some of our local governments about some issues here, particularly two, as I have said. I want to address the issue of zoning.

Mr. Speaker, as to the cellular industry expanding into the next century, there will be a need for an estimated 100,000 new transmission poles to be constructed throughout the country, I am told. I want to make sure that nothing in H.R. 1555 preempts the ability of local officials to determine the placement and construction of these new towers. Land use has always been, and I believe should continue to be, in the domain of the authorities in the areas directly affected.

I must say I appreciate that communities cannot prohibit access to the new facilities, and I agree they should not be allowed to, but it is important that cities and counties be able to enforce their zoning and building codes. That is the first point.

Similarly, Mr. Speaker, I want to clarify that the bill does not restrict the ability of local governments to derive revenues for the use of public rights-of-way so long as the fees are set in a nondiscriminatory way.

Mr. BLILEY. Mr. Speaker, will the gentleman yield?

Mr. GOSS. I am happy to yield to the gentleman from Virginia, the distinguished chairman of the Committee on Commerce.

Mr. BLILEY. Mr. Speaker, I thank the gentleman for yielding. I want to commend the gentleman and his colleagues and the chairman of the Committee on Rules for this rule. I wholeheartedly support it.

Let me say this, I was president of the Virginia Municipal League as well as being Mayor of Richmond, and I was on the board of directors of the National League of Cities. When legislation came to this body in a previous Congress for a taking of Manassas Battlefield, I voted against it because the supervisors of Prince William County had made that decision. I have resisted attempts by people to get me involved in the Civil War preservation of Brandywine Station in Culpeper County for the same reasons.

Nothing is in this bill that prevents a locality, and I will do everything in conference to make sure this is absolutely clear, prevents a local subdivision from determining where a cellular pole should be located, but we do want to make sure that this technology is available across the country, that we do not allow a community to say we are not going to have any cellular pole in our locality. That is wrong. Nor are we going to say they can delay these people forever. But the location will be determined by the local governing body.

The second point you raise, about the charges for right-of-way, the councils, the supervisors and the mayor can make any charge they want provided they do not charge the cable company one fee and they charge a telephone company a lower fee for the same right-of-way. They should not discriminate, and that is all we say. Charge what you will, but make it equitable between the parties. Do not discriminate in favor of one or the other.

Mr. GOSS. Mr. Speaker, reclaiming my time, I thank the gentleman for that very clear explanation.

Mr. BLILEY. If the gentleman would continue to yield, the gentlewoman from Maryland has raised a point with me about access for schools to this new technology. Let me assure the gentlewoman that I know there is a provision on this in the Senate bill, and I will work with her and work with the other body to see that it is preserved and the intent of what she would have offered had she been able to is carried out in the final legislation.

Mr. GOODLATTE. Mr. Speaker, will the gentleman yield?

Mr. GOSS. I yield to the gentleman from Virginia.

Mr. GOODLATTE. Mr. Speaker, I thank the gentleman for yielding.

Mr. Speaker, I have heard from a number of my local constituents, and I know the chairman is very strongly supportive of the rights of localities and strongly supportive of decentralized government. We have had some conversations about the process here, and I wonder if I may get a clarification.

Is my understanding correct that the gentleman is committed in the conference process to offer new language that will make it crystal clear that localities will have the authority to determine where these poles are placed in their community so long as they do not exclude the placement of poles altogether, do not unnecessarily delay the process for that purpose, do not favor one competitor over another and do not attempt to regulate on the basis of radio frequency emissions which is clearly a Federal issue? Is that an accurate statement of your intention?

Mr. GOSS. I am happy to yield to the distinguished chairman.

Mr. BLILEY. That is indeed, and I will certainly work to that end.

Mr. GOODLATTE. Thank you and I look forward to working with the chairman.

Mr. BEILENSON. Mr. Speaker, I yield 1 minute to the gentleman from Texas [Mr. DOGGETT].

Mr. DOGGETT. Mr. Speaker, if this bill really deserves a full and open debate, as the gentleman from Georgia has suggested, then why are we taking it up at midnight?

Mr. Speaker, this is a bill that affects the telephone in every house and every workplace in this country. It is a bill that affects every television viewer in this country and a wide array of other telecommunications services, and when does this Congress consider it? At midnight, after a full day of debate on an appropriations bill.

Regardless of your view on this bill, and I think it has some merit, regardless of your view on the substance of the bill, this sorry procedure ought to be voted down along with this rule. What an incredible testament to this new Republican leadership that they could take a bill of this vital importance to the people of America and not take it up until midnight.

You can roll the votes. That just means there will not be anybody here listening to the debate. You can roll them all night long, as you plan to do. The real question is whether you will roll the American consumer.

Mr. LINDER. Mr. Speaker, I yield 1 minute to the gentleman from Texas [Mr. BARTON].

Mr. BARTON of Texas. Mr. Speaker, I want to rise in support of the rule. I think this is a good rule.

Mr. Speaker, I want to point out to my colleagues that if this were a software package that would be version 5 or 6. We have been working on this issue for the last 5 years in the Congress. We had a bill pass the House; we never went to conference with the Senate last year.

There is one amendment that has been made in order, a bipartisan amendment, the Stupak-Barton amendment, that deals directly with local access, local control of rights-of-way for the cities that is very bipartisan in nature, and I would urge support of that amendment if we can reach agreement on it, which we are still working on that.

So this is a good rule, I want to thank the Committee on Rules for making Stupak-Barton in order, and I would urge Members to vote for the rule.

Mr. BEILENSON. Mr. Speaker, I yield 3 minutes to the distinguished gentleman from Michigan [Mr. DINGELL], the ranking member of the committee.

(Mr. DINGELL asked and was given permission to revise and extend his remarks.)

□ 2315

Mr. DINGELL. Mr. Speaker, I rise in support of the rule. I urge my colleagues to vote for it. H.R. 1555 is a complex bill. It deals with a complex industry. It comprises a substantial portion of the American economy.

There are a lot of controversies in this legislation, and it should not be dealt with cavalierly. It is a matter of some regret to me we are proceeding late at night and that we have not had more time for this. But, nonetheless, the bill that would be put on the floor by the rule resolves many important questions, and it pulls out of a court room, where one judge, a couple of law clerks, a gaggle of Justice Department lawyers, and several hotel floors of AT&T lawyers, have been making the entirety of telecommunications policy for the United States since the breakup.

The breakup of AT&T was initiated by its president, Mr. Charley Brown, and it was done because he had gotten tired of having MCI sue him instead

Manager's Amendment as adopted by House H.L.C.

"(C) recognize that the pole, duct, conduit, or right-of-way has a value that exceeds costs and that value shall be reflected in any rate; and

[25. Required Telecommunications Services]

Page 89, line 21, strike "A franchising" and insert "Except as otherwise permitted by law, a franchising authority".

Page 89, line 23, before "as a condition" insert the following: ", other than intragovernmental telecommunications services,".

[26. Facilities Siting]

Page 90, beginning on line 11, strike paragraph (7) through line 6 on page 93 and insert the following:

"(7) FACILITIES SITING POLICIES.—(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy to reconcile State and local regulation of the siting of facilities for the provision of commercial mobile services or unlicensed services with the public interest in fostering competition through the rapid,

efficient, and nationwide deployment of commercial mobile services or unlicensed services.

"(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies.

"(C) The policy prescribed pursuant to this subparagraph shall take into account—

"(i) the need to enhance the coverage and quality of commercial mobile services and unlicensed services and foster competition in the provision of commercial mobile services and unlicensed services on a timely basis;

"(ii) the legitimate interests of State and local governments in matters of exclusively local concern, and the need to provide State and local government with maximum flexibility to address such local concerns, while ensuring that such interests do not prohibit or have the effect of precluding any commercial mobile service or unlicensed service;

"(iii) the effect of State and local regulation of facilities siting on interstate commerce;

"(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services or unlicensed services; and

"(v) the need to provide due process in making any decision by a State or local government or instrumentality thereof to grant or deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services or unlicensed services.

"(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(E) The proceeding to prescribe such policy pursuant to this paragraph shall supercede any proceeding pending on the date of enactment of this

paragraph relating to preemption of State and local regulation of tower siting for commercial mobile services, unlicensed services, and providers thereof. In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.

"(F) For purposes of this paragraph, the term 'unlicensed service' means the offering of telecommunications using duly authorized devices which do not require individual licenses.".

Page 94, line 2, strike "cost-based".

~~[27. Telecommunications Development Fund]~~

Page 101, after line 23, insert the following new section (and redesignate the succeeding section and conform the table of contents accordingly):

SEC. 111. TELECOMMUNICATIONS DEVELOPMENT FUND.

(a) DEPOSIT AND USE OF AUCTION ESCROW ACCOUNTS.—Section 309(j)(8) of the Act (47 U.S.C.

WEDNESDAY, JUNE 14, 1995

Feinstein/ Kempthorne amendment No. 1270, to strike the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services.

Gorton amendment No. 1277 (to the language proposed to be stricken by amendment No. 1270), to limit, rather than strike, the preemption language.

The PRESIDING OFFICER. There will now be 20 minutes debate on the Feinstein amendment No. 1270, to be equally divided in the usual form, with the vote on or in relation to the amendment to follow immediately.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Madam President, the amendment that is the subject of discussion is one presented by Senator Kempthorne and me. There is a section in this bill entitled "Removal of Entry to Barriers." It is a section about which the cities, the counties and the States are very concerned because it is a section that giveth and a section that taketh away. Why do I say that? I say it because in section 254, the States and local governments are given certain authority to maintain their jurisdiction and their control over what are called rights-of-way.

Rights-of-way are streets and roads under which cable television companies put lines. How they do it, where they do it and with what they do it is all a matter for local jurisdiction. Both subsections (b) and (c) maintain this regulatory authority of local jurisdictions, but subsection (d) preempts that authority, and this is what is of vital concern to the cities, the counties and the States.

Senator Kempthorne and I have a simple amendment. That amendment, quite simply stated, strikes the preemption and takes away the part of this bill that takes away local government and State governments' jurisdiction and authority over the rights-of-way.

We are very grateful to Senator Gorton who has presented a substitute, which will be voted on following our amendment. However, we must, quite frankly, say this substitute is inadequate.

Why is it inadequate? It is inadequate because cities and counties will continue to face preemption if they take actions which a cable operator asserts constitutes a barrier to entry and is prohibited under section (a) of the bill. As city attorneys state, is a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? Is a city requirement that a cable operator move a cable trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?

These are, we contend, intensely local decisions which could be brought before the FCC in Washington. The Gorton substitute continues to permit cable operators to challenge local government decisions before the FCC.

Why is this objectionable to local jurisdictions? It is objectionable to local jurisdictions because they believe if they are a small city, for example, they would be faced with bringing a team back to Washington, going before a highly specialized telecommunications-oriented Federal Communications Commission and plighting their troth. Then they would be forced to go to court in Washington, DC, rather than Federal district court back where they live. This constitutes a major financial impediment for small cities. For big cities also, they would much prefer to have the issue settled in their district court rather than having to come back to Washington.

The cable operators are big time in this country. They maintain Washington offices, they maintain special staff, they maintain a bevy of skilled telecommunications attorneys. Cities do not. Cities have a city attorney, period. It is a very different subject.

Suppose a city makes a determination in the case that they wish to have [*S8306] wiring done evenly throughout their city-I know, and I said this on the floor before, when I was mayor, the local cable operator wanted only to wire the affluent areas of our city.

We wanted some of the less affluent areas wired; we demanded it, and we were able to achieve it. Is this a barrier to entry? Could the cable company then appeal this and bring it back to Washington, meaning that a bevy of attorneys would have to come back, appear before the FCC, go to Federal court here or with the local jurisdiction, and maintain its authority, as it would under the Kempthorne- Feinstein amendment. And then the cable operators, if they did not like it, could take the item to Federal court. We believe to leave in the preemption is, in effect, to create a Federal mandate without funding. So we ask that subsection (d) be struck and have put forward this amendment to do so.

I yield now to the Senator from Idaho.

Mr. KEMPTHORNE. Madam President, how much time do we have remaining?

The PRESIDING OFFICER. There are 3 minutes 21 seconds remaining.

Mr. KEMPTHORNE. Madam President, I will reserve my time and ask if the Senator from Washington would like to speak at this point.

I yield the floor and reserve the remainder of my time.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. Madam President, the section at issue here is a section entitled "Removal of Barriers to Entry." And the substance of that section is that "No State or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services."

Madam President, this is not about cable companies, although cable companies are one of the subjects of the section. This is about all of the telecommunications providers that are the subject of this bill. And it is the goal of this bill to see to it that the maximum degree of competition is available. And in doing so, these fundamental decisions about whether or not an action of the State or local government is an inhibition or a barrier to entry almost certainly must be decided in one central place.

The amendment to strike the preemption section does not change the substance. What it does change is the forum in which any disputes will be conducted. And if this amendment-the Feinstein amendment-in its original form is adopted, that will be some 150 or 160 different district courts with different attitudes. We will have no national uniformity with respect to the very goals of this bill, what constitutes a serious barrier to entry.

This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction or one cable television provider in its jurisdiction, no national organization, no Federal Communications Commission will have the right to preempt and to frustrate that monopolistic purpose. It will have to be done in a local district court. And then if another community in another part of the country does the same thing, that will be decided in that district court.

So, Madam President, this amendment-the Feinstein amendment-goes far beyond its legitimate scope. But it does have a legitimate scope. I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or a county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section.

So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances. But if, under section (b), a city or county makes quite different rules relating to universal service or the quality of telecommunications services-the very heart of this bill-then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill. So, Madam President, I am convinced

that Senators Feinstein and Kempthorne are right in the examples that they give, the examples that have to do with local rights of way. And the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the jurisdictions which are affected.

But if we adopt their amendment, we have destroyed the ability of the very commission which has been in existence for decades to seek uniformity, to promote competition, effectively to do so; and we will have a balkanized situation in every Federal judicial district in the United States. So their amendment simply goes too far.

Now, Madam President, I can see some, including some of the sponsors of the bill, who feel that this preemption ought to be total. And those who feel it ought to be total should vote "no" on the Feinstein amendment and "no" on mine as well. Those who feel that there should be no national policy, that local control and State control of telecommunications is so important that the national policy should not be enforced by any central agency, should vote for the Feinstein amendment. But those who believe in balance, those who believe that there should be one central entity to make these decisions, subject to judicial review when they have to do with whether or not there is going to be competition, when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers, but believe that local government should retain their traditional local control over their rights of way, should vote against the Feinstein amendment and should vote for mine. It is the balance. It meets the goals that they propose their amendment to meet without being overly broad and without destroying the national system of telecommunications competition, which is the goal of this bill.

Mr. KEMPTHORNE. Madam President. I am proud to join Senator Feinstein in this amendment. I also wish to acknowledge the efforts of the Senator from Washington, Senator Gorton , because all of us are trying to correct what is a flaw in this bill. I find it ironic that the title of this bill, the Telecommunications Competition and Deregulation Act of 1995, this flaw that is in this bill smacks right at this whole aspect of deregulation, which this Congress has been very good about reestablishing the rights of States and local units of government.

Madam President, this amendment is not about guaranteeing access to the public right of way. As the Senator from Washington just pointed out, that language is in there. That is section (a). This amendment is not about preserving the ability of a State to advance universal service and to ensure quality in telecommunications services, because, Madam President, that is right here in section (b) of the bill. This amendment is not about ensuring that local governments manage their rights of way in a competitively neutral and nondiscriminatory basis, because that is in section (c) of this bill.

In fact, the Senator from Texas, the Presiding Officer, was instrumental in having section (c) put into this act. It was very helpful. The whole problem is, Madam President, section (d) then preempts all of that. In section (d), it states-and I will summarize-that the commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

I think it is a shame that your good, hard work, Madam President, now has section (d) that preempts it and pulls the plug on that. There are those that would say the reason you have to have that particular section is because there may be instances in local government that may compel a cable company to give what they call extractions. We asked our cable company in Idaho: Can you give us some examples of where a local community has sought extractions, where you might have to go in trees and do something special? We do not have any examples. I find it ironic [*S8307] that because there are some who believe that these extractions could take place, the remedy is to say that we will now have a Federal commission of nonelected people preempt what local or State governments do. ;That is backsliding from what we have been trying to do with this Congress.

The Senator from Washington said that we must decide these cases in one place. That message is very clear, Madam President. If there is a problem, then we are now going to say with this legislation, if we leave section (d) in there, they must come to Washington, DC. You must come to Washington, DC.

What has happened to federalism, to States rights and local rights? It was brought to my attention that in the State of Arizona they have pointed out that this, in fact, could preempt the Constitution of the State of Arizona.

This is a flaw in this legislation, Madam President, that, again, a nonelected Commission-which I have a great respect for that Commission-could, in essence, preempt the Constitution of the State.

I ask unanimous consent to have printed in the Record a letter from the National Governors' Association, National Conference of State Legislatures, National Association of Counties, National League of Cities, U.S. Conference of Mayors, all

in support of this amendment. They point out that this will not be the impediment to the barrier, but it is the right amendment to correct this flaw. There being no objection, the material was ordered to be printed in the Record, as follows:

National Governors' Association, National Conference of State Legislatures, National Association of Counties, National League of Cities, and United States Conference of Mayors,

June 6, 1995.

Hon. Robert Dole,

Majority Leader, U.S. Senate,

Hon. Tom Daschle,

Minority Leader, U.S. Senate,

Washington, DC.

Dear Senator Dole and Senator Daschle: On behalf of state and local governments throughout the nation, we are writing to strongly urge your support for two amendments to S. 652, the Telecommunications Competition and Deregulation Act of 1995. Together these amendments would prevent an unwarranted preemption of state and local government authority and speed the transition to a competitive telecommunications environment. The first amendment achieves the appropriate balance between the needed preemption of barriers to entry and the legitimate authority of states and localities, and the second permits states to continue efforts already underway to promote competition.

First, Senator Feinstein will offer an amendment to delete a broad and ambiguous preemption section (section 254(d) of Title II). The Senate's bill's proposal under Section 254(d) for Federal Communications Commission (FCC) review and preemption of state and local government authority is totally inappropriate. Section 254 (a) and (c) provide the necessary safeguard against any possible entry barriers or impediments by state and local governments in the development of the information superhighway. In particular we are concerned that Section 254(d) would preempt local government authority over the management of public rights-of-way and local government's ability to receive fair and reasonable compensation for use of the right-of-way. We strongly opposed any preemption which would have the impact of imposing new unfunded costs upon our states, local governments, and taxpayers.

Second, Senator Leahy will offer an amendment to strike language preempting states from requiring intraLATA toll dialing parity. Ten states have already established this requirement as a means of increasing competition; thirteen more states are considering its adoption. If the goal of S 652 is to increase competition, the legislation should not take existing authority from states that is already being used to further compensation. We strongly oppose this preemption and urge your support for Senator Leahy's amendment.

Again, we urge you to join Senator Feinstein and Senator Leahy in their efforts to eliminate these two provisions from the bill and avoid unwarranted preemption of state and local government in this critical area.

Sincerely,

Co-Lead Governor on Telecommunications.

President, National Conference of State Legislatures.

President, National Association of Counties.

President, National League of Cities.

National Governors Association, Washington, DC, June 8, 1995.

State Preemption in Federal Telecommunications Deregulation Legislation

SUMMARY

The U.S. Senate has begun consideration of S. 652, a bill to rewrite the Federal Communications Act of 1934 to promote competition. Several provisions in the bill and certain proposed amendments would adversely affect states, and Governors need to communicate their concerns to their senators to:

Support the Feinstein/ Kempthorne amendment to strike section 254(d) on FCC preemption:

Support the Leahy/Simpson amendment to protect the state option to require intraLATA toll dialing parity (open, competitive markets for regional phone service); and

Oppose the Packwood/McCain amendment to preempt local and state authority to tax direct broadcast satellite services (DBS). BACKGROUND

Both the House and the Senate have reported legislation to reform the Federal Communications Act of 1934. The Senate bill, S. 652, would require local phone companies to open their networks to competitors while also permitting those companies to offer video services in competition with local cable television franchises. Once the regional Bell telephone companies open their networks, they can apply to the Federal Communications Commission (FCC) for permission to offer long-distance service.

During the debate over telecommunications in 1994, states and localities banded together to promote three principles for inclusion in federal legislation: strong universal service protections, regulatory flexibility that would retain an effective role for states to manage the transition to a procompetitive environment rather than federal agency preemption, and authority for states and localities to manage the public rights-of-way. At a June 6 meeting of the State and Local Coalition, chaired by Governor George V. Voinovich, the attached letter was signed by local officials and Iowa Governor Terry E. Branstad, NGA co-lead Governor on Telecommunications. The letter calls for the support of two amendments. Feinstein/ Kempthorne Amendment: Deleting Section 254(d). Senator Dianne

Feinstein (D-Calif.) and Senator Dirk Kempthorne (R-Idaho) are offering an amendment that would strip broad and

ambiguous FCC preemption language from section 254(d) of the bill. Section 254(a) preempts states and localities from erecting barriers to entry, and this preemption is supported by NGA policy. Section 254(b) permits states to set terms and conditions for doing business within a state, including consumer protections and quality of services; section 254(c) ensures the authority of states and local government to manage the public rights-of-way.

Paragraph (c) was inserted in the bill in committee by Senator Kay Bailey Hutchison (R-Tex.), and includes a requirement that any such fees and charges be nondiscriminatory. Paragraph (d) states that if the FCC "determines that a state or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." Because small telephone or cable companies are unlikely to have a presence in Washington, D.C., this provision would result in a bias toward major competitors. Striking paragraph (d) leaves adequate protections for a competitive market. Leahy/Simpson Amendment: Deleting Preemption of State Authority to Require IntraLATA Toll Dialing Parity. One major reason that competition in long distance service has increased is the requirement that local phone companies permit long-distance carriers dialing parity (i.e., consumers no longer have to dial additional numbers to utilize an alternative long-distance carrier service). Customers choose a carrier, and all interLATA calls are billed through that company. However, calls within a local access and transport area (intraLATA), or so-called short-haul or regional long-distance calls, are under state jurisdiction and not subject to this FCC rule. To date, ten states have required toll dialing parity, and twelve states are currently considering its adoption. Paragraph 255(B)(ii) of S. 652 would preempt the authority of states to order intraLATA toll dialing parity; Senator Patrick S. Leahy (D-Vt.) and Senator Alan K. Simpson (R-Wyo.) are offering an amendment that would remove this preemptive language.

State and Local Taxing Authority. As reported by the Senate Commerce, Science, and Transportation Committee, S. 652 includes language ensuring that state and local government taxation authority is not affected by the bill. Senator Bob Packwood (R-Ore.) and Senator John McCain (R-Ariz.) may offer an amendment exempting the DBS industry from any local taxation, even taxes administered by states. This language is taken from H.R. 1555, recently approved by the House Commerce Committee. States must ensure that the Senate bill avoids the preemption of state and local taxing authority.

ACTIONS NEEDED

Governors need to contact their senator to urge support for both the

Feinstein/ [*S8308] Kempthorne amendment and the Leahy/Simpson amendment, and to urge opposition to the Packwood/McCain amendment.

Mr. LEVIN. Madam President, I support the Feinstein amendment to remove the provision in S. 652 which would preempt local control of the public rights-of-way.

The Feinstein amendment would remove section 254(d) of the telecommunications bill currently being considered by the Senate which directs the FCC to examine and preempt any State and local laws or regulations which might prohibit a company from providing telecommunications services.

As a former local official I have always felt it was important that we in Congress pay proper recognition to the rights of local government.

Section 254(d) is the type of legislating that we in Washington should not be doing-preempting State and local decisions in areas where local government has the responsibility and specified knowledge to act in the best interest of their local communities. Washington should not micromanage how local government administers its streets, highways, and other public rights-of-way.

I will vote in favor of the Feinstein amendment and in favor of the right of local governments to retain control over their streets, highways, and rights-of-way.

Mr. KEMPTHORNE. Madam President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator's time is expired.

Mr. GORTON. Madam President, how much time is remaining?

The PRESIDING OFFICER. Three minutes, 38 seconds.

Mr. GORTON. Madam President, once again, the alternative proposal, which will be voted on only if this amendment is defeated, retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts. The Feinstein amendment itself, Madam President, would deprive the FCC of any jurisdiction over a State law which deliberately prohibited or frustrated the ability of any telecommunications entity to provide competitive service.

It would simply take that right away from the FCC, and each such challenge would have to be decided in each of the various Federal district courts around the country.

The States retain the right under subsection (d) to pass all kinds of legislation that deals with telecommunications providers, subject to the provision that they cannot impede competition.

The determination of whether they have impeded competition, not by the way they manage trees or rights of way, but by the way they deal with substantive law dealing with telecommunications entities. That conflict should be decided in one central place, by the FCC.

The appropriate balance is to leave purely local concerns to local entities, but to make decisions on the natural concerns which are at the heart of this bill in one central place so they can be consistent across the country. Madam President, the purposes of this bill will be best served by defeating this amendment and adopting the subsequent amendment. I yield back the balance of my time.

Mrs. FEINSTEIN. Madam President, I ask for the yeas and nays.

The PRESIDING OFFICER (Mr. Campbell). Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the Feinstein amendment No. 1270.

The clerk will call the roll.

The bill clerk called the roll.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote? The result was announced- yeas 44, nays 56, as follows:

(Rollcall Vote No. 258 Leg.)

YEAS-44 Abraham Wellstone

NAYS-56 Ashcroft

So the amendment (No. 1270) was rejected.

Mr. GORTON. Mr. President, I move to reconsider the vote.

Mr. PRESSLER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. PRESSLER. I ask unanimous consent that the Gorton amendment now be adopted by voice vote.

The PRESIDING OFFICER. The question is on agreeing to the amendment. Without objection, the amendment is agreed to.

So the amendment (No. 1277) was agreed to.

Mr. GORTON. Mr. President, I move to reconsider the vote.

Mr. PRESSLER. I move to lay that motion on the table.

TUESDAY, JUNE 13, 1995

Mr. GORTON. Mr. President, I ask unanimous consent that we return to the Feinstein -Kempthorne amendment.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

AMENDMENT NO. 1277 TO AMENDMENT NO. 1270

(Purpose: To limit, rather than strike, the preemption language)

Mr. GORTON. Mr. President, I send a second-degree amendment to the

Feinstein -Kempthorne amendment to the desk and ask for its consideration. The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Washington (Mr. Gorton) proposes an amendment numbered 1277 to amendment No. 1270.

In the matter proposed to be stricken, strike "or is inconsistent with this section, the Commission shall promptly" and insert "subsection (a) or (b), the Commission shall".

Mr. GORTON. Mr. President, last night, our distinguished colleagues from California and Idaho proposed an amendment with respect to a section entitled "Removal of Barriers to Entry." That section in toto says that the States and local communities cannot impose State or local requirements that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.

Mr. President, that, of course, is a very, very broad prohibition against State and local activities. And so thereafter there follow two subsections that attempt to carve out reasonable exemptions to that State and local authority. One has to do specifically with telecommunications providers themselves and speaks in the general term of allowing States to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, which are, of course, the precise goals of this Federal statute itself.

However, the third exception is "Local Government Authority." That local government authority relates to the right of local governments to manage public rights-of-way, require fair and reasonable compensation to telecommunications providers, the use of public rights-of-way on a nondiscriminatory basis, and so on.

Then the final subsection is a preemptive subsection, Mr. President, and it reads:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. Now, our two distinguished colleagues said that that preemption was much too broad, that its effect would be to say to a major telecommunications provider or utility all you have to do, if the city of San Francisco or the city of Boise attempts to tell you what hours you can dig in the city streets or how much noise you can make or how you have to reimburse the city for the damage to its public rights-of-way, that all that the utility would have to do would be to appeal to the Federal Communications Commission in Washington, DC, and thereby remove what is primarily a local question and make a Federal question out of it which had to be decided in Washington, DC, by the Federal Communications Commission. And so the Feinstein -Kempthorne amendment strikes this entire preemption section.

Now, the Senator from California I think very properly tells us what the impact of that will be. It does not impact the substance of the first three subsections of this section at all, but it does shift the forum in which a question about those three subsections is decided. Instead of being the Federal Communications Commission with an appeal to a Federal court here in the District of Columbia, those controversies will be decided by the various district courts of the United States from one part of this country across to every other single one. Now, Mr. President, in the view of this Senator, there is real justification in the argument for both sides of this question. The argument in favor of the section as it has been reported by the Commerce

Committee is that we are talking about the promotion of competition. We are talking about a nationwide telecommunications system.

There ought to be one center place where these questions are appropriately decided by one Federal entity which recognizes the impact of these rules from one part of the country to another and one Federal court of appeals.

On the other hand, the localism argument that cities, counties, local communities should control the use of their own streets and should not be required to come to Washington, DC, to defend a permit action for digging up a street, for improving or building a new utility also has great force and effect, Mr. President. I think it is a persuasive argument.

So in order to try to balance the general authority of a single Federal Communications Commission against the specific authority of local communities, I have offered a second-degree amendment to the Feinstein -Kempthorne amendment. I hope that the sponsors of the amendment will consider it to be a friendly one. More often than not in this body, second-degree amendments are designed to totally subvert first-degree amendments to move in a completely different direction, sometimes to save Members from embarrassing votes. This is not such a case.

I have read the arguments that were made by the two Senators who sponsored the first-degree amendment. I agree with them, but almost without exception, their arguments speak about the control by cities and other local communities over their own rights of way, an area in which their authority should clearly be preserved, a field in which they should not be required to have to come to Washington, DC, in order to defend their local permitting or ordinance-setting actions.

I agree with those two Senators in that respect, but I do not agree that we should sweep away all of the preemption from an entire section, which is entitled "Removal of Barriers to Entry"; that fundamental removal to those barriers, an action by a State or a city which says only one telephone company can operate in a given field, for example, or only one cable system can operate in a given field, should not be exempted from a preemption and from a national policy set by the Federal Communications Commission. [*S8213] So this amendment does two things, both significant. The first is that it narrows the preemption by striking the phrase "is inconsistent with" so that it now allows for a preemption only for a requirement that violates the section. And second, it changes it by limiting the preemption section to the first two subsections of new section 254: that is, the general statement and the State control over utilities.

There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from those two Senators that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.

So I hope that it is a way out of the dilemma in which we find ourselves, the preservation of that local authority without subverting what ought to be nationwide authority. It will be a while, I think, before this comes to a vote. I commend this middle ground to both the managers of the bill and the sponsors of the amendment. I hope that they will accept it.

AMENDMENT NO. 1270

(Purpose: To strike the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services) Mrs. FEINSTEIN. Mr. President, on behalf of Senator Kempthorne and myself, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from California (Mrs. Feinstein), for herself and Mr. Kempthorne, proposes an amendment numbered 1270.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 55, strike out line 4 and all that follows through page 55, line 12.

Mrs. FEINSTEIN. Mr. President, I come to the floor today joined by our colleague, Senator Kempthorne, to offer this amendment on behalf of a broad coalition of State and local governments. Since announcing my intention to proceed with this amendment, I have received letters of support from hundreds of cities across the country, including the States of Arizona, Colorado, Florida, Illinois, Indiana, California, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Ohio, Texas, and Washington.

This amendment is supported by the National Governors' Association, the National Association of Counties, the National Conference of State Legislatures, the National League of Cities, and the U.S. Conference of Mayors, to name a few.

Mr. President, as a former mayor, I fully understand why Governors, mayors, city councils, and county boards of supervisors question allowing the Federal Communications Commission to second-guess decisions made at State and local government levels.

On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.

The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.

That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist at the FCC, on what may be very broad question of State or local government rights.

In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for States. I hope to explain why. I know my colleague, the Senator from Idaho, will do that as well.

A cable company would, and most likely will, appeal any local decision it does not like to the telecommunications experts at the Federal Communications Commission.

The city attorney of San Francisco advises that, in San Francisco, city laws provide that all street excavations must comply with local laws tailored to the specifics of the local communities, including the geography, the density of development, the age of public streets, their width, what other plumbing is under the street, the kind of surfacing the street has, et cetera. The city attorney anticipates that whenever application of routine, local requirements interfere with the schedule or convenience of a telecommunications supplier, subsection (d), the provision we hope to strike, would authorize a cable company to seek FCC

preemption. Any time they did not like the time and location of excavation to preserve effective traffic flow or to prevent hazardous road conditions, or minimize noise impacts, they could appeal to the FCC.

If they did not like an order to relocate facilities to accommodate a public improvement project, like the installation, repair, or replacement of water, sewer, our public transportation facilities, they would appeal.

If they did not like a requirement to utilize trenches owned by the city or another utility in order to avoid repeated excavation of heavily traveled streets, they would appeal.

If they did not like being required to place their facilities underground rather than overhead, consistent with the requirements imposed on other utilities, they could appeal.

If they were required to pay fees prior to installing any facility to cover the costs of reviewing plans and inspecting excavation work, they could appeal.

If they did not like being asked to pay fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation, they would appeal.

If they did not like the particular kinds of excavation equipment or techniques that a city mandate that they use, they could appeal.

If they did not like the indemnification, they could appeal.

The city attorney is right, that preemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.

Small cities are placed at risk and oppose the preemption because small cities are often financially strapped. As the city attorney of Redondo Beach, a suburb of Los Angeles writes, every time there is an appeal, they would have to find funds to come back to Washington to fight an appeal at the FCC.

Recently, the engineering design center at San Francisco State University, conducted an interesting study for San Francisco on the impact of street cuts on public roads. The expected life and value of public roads and streets directly correlates with the number of cuts into the road.

Although this is rather dull and esoteric to some, the study reveals that streets with three to nine utility cuts are expected to require resurfacing every 18 years, a 30-percent reduction in service life, relative to streets with less than three cuts. The more road cuts, the steeper the decline in value of the public's asset will be. Streets with more than nine cuts are expected to require resurfacing every 13 years, a 50-percent reduction in the service life of streets with less than three cuts.

An even more dramatic decline in a street's useful life is found on heavily traveled arterial streets with heavy wheel traffic. For those streets, the anticipated useful life declines even more rapidly, from 26 years for streets with fewer than three cuts to 17 years for streets with three to nine cuts, a 35-percent reduction, to 12 years for streets with more than nine cuts, a 54-percent reduction

What does this mean? It means that financially struggling cities and counties will undoubtedly be forced to include in franchise fees, charges to allow the recovery of the additional maintenance requirements that constantly cutting into streets requires. The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their roads. States should have control over their highways.

The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $ 86 billion in 1993 alone. Of the $ 86 billion, more than $ 22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.
[*S8171]

I would also like to point out the preemption will change the outcome in some of the dispute between communication companies and cities and States. The FCC is the Nation's telecommunications experts. But they do not have the broad experience and concerns a mayor, a city council, a board of supervisors, or a Governor would have in negotiating and weighing a cable agreement and setting a cable fee. If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court.

This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or county government would have to come to the Federal court in Washington after an appeal to the FCC.

A city appealing an adverse ruling by the FCC would appear before the D.C. Federal Appeals Court rather than in the Federal district court of the locality involved. Further, the Federal court will evaluate a very different legal question-whether the FCC abused their discretion in reaching its determination. The preemption will force small cities to defend themselves in Washington, and many will be just unable to afford the cost.

By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances.

Edward Perez, assistant city attorney for Los Angeles, states this will be a very difficult standard to reverse, if they have to come to Washington. On matters involving communication issues, courts are likely to require a tough, heightened scrutiny standard for matters involving first amendment rights involving freedom of speech. Courts are likely to defer to the FCC judgment.

The FCC proceeding and its appeal in Washington will be very different from the Federal court action in a locality. Both the city and the communications company are more likely to be able to develop a more complete and thorough record if the proceeding is before the local Federal court rather than before a Government body in Washington.

We also believe the FCC lacks the expertise to address cities' concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

Mr. President, this stack of letters opposing the preemption includes virtually every California city and virtually every major city in every State.

What the cities and the States tell us they want us to give local governments the opportunity for home rule on questions affecting their public rights-of-way. If the cable company does not like it, the cable company can go to court in that jurisdiction. By deleting the preemption, we can increase fairness, minimize cost to cities, counties, and States, and prevent an unfunded mandate.

If the preemption remains in this bill, it creates a major unfunded mandate for cities, for counties, and for States. I hope this body will sustain the cities and the counties and the States, and strike the preemption.

So I ask unanimous consent to have a number of letters printed in the Record .

There being no objections, the letters were ordered to be printed in the Record, as follows:

Office of the City Attorney,

Los Angeles, CA, June 12, 1995.

Re S. 652, Section 245(d) Preemption.

Mr. Kevin Cronin,

Office of Senator Diane Feinstein, Senate Hart Office Building, Washington, DC.

Dear Mr. Cronin: You asked for our thoughts regarding S. 652, Sec. 254(d), which would create broad preemption rights in the FCC with respect to actions taken by local governments. Specifically, you are interested as to how section 254(d) could frustrate the ability of local government to manage its rights of way as Congress believes Local Government should (See Sec. 254(c)) and how it could prevent Local Government from imposing competitively neutral requirements on telecommunications providers to preserve and advance Universal Service, protect the public safety and welfare and to ensure the continued quality of telecommunications services and safeguard the rights of consumers. (See Sec. 254(b)).

Section 254(d) would permit the Federal Communications Commission ("FCC") to preempt local government:

"(d) preemption.- If, after notice and an opportunity for public comment, the Commission determined that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." Section 254(d) reposes sweeping review powers in the FCC and in effect converts a federal administrative agency into a federal administrative Court. The FCC literally would have the power to review any local government action it wishes (either sua

sponte or at the request of the industry.) The undesirable consequence of this result will be that a federal agency-with personnel who do not answer directly to public-will be dictating in fine detail what rules local government and their citizens in distant places shall have to follow. The FCC would be given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, to decide to nullify or preempt such governmental actions. That is unprecedented and for reaching authority for a federal agency to have over local government.

The FCC does have an important role to play in the scheme of things. It has a professional staff with proven expertise in telecommunications matters such as technical requirements. Moreover, issues that transcend state borders need the FCC as the overseer in order to ensure consistency and fairness between the states. On the other hand, the FCC is not in the best position to know what is best for citizens at the local level regarding local issues. An example of a singularly local issue, historically recognized by Congress and the Courts, is the local government's right to manage the public right-of-way (See Section 254(c)). Federal officials do not have an adequate understanding of local issues nor do they have the staff, either in size or proficiency, to resolve local issues about every city in this country. Local Governments and the local courts (entities which are knowledgeable about local issues) should be the forum for resolution of local issues.

An important point that needs to be explicated to Congress is the procedural problems associated with the FCC resolving local issues in Washington. First is the obvious problem. Most citizens, community groups and cities do not have the financial wherewithal to litigate before a federal agency located in Washington. Even if an action of the FCC is reviewed by the Courts, that also would occur in the Washington D.C. Circuit miles away. Section 254(d) does contain due process language and such a provision may meet the technical requirements of the U.S. Constitution. However, the provision "If, after notice and an opportunity for public comments * * *" provides little solace for local governments and its citizens. The FCC all too often provides too little time to respond to its rules and rulemaking proceedings for anyone other than the expensive FCC Bar. It is impractical for local people to respond in a timely fashion and FCC preemption consequently precludes the voice of those most effected. Second, as a general rule the courts pay great difference to administrative agencies that are created for specific purposes.

There is no argument with that proposition because of the proven expertise of federal agencies in matters properly within their purview. However, a serious problem is created when a federal administrative agency is given power over issues where it has little expertise, such as the management of local rights-of-way. This is largely so because of the legal standards for review of administrative decisions. Generally, a decision will stand unless the agency has abused its discretion or has exceeded its authority

Again, for matters properly within an agency's purview there is no quarrel. However, the sweeping review powers that Section 254(d) places in the FCC would in essence permit the FCC to preempt any statute, regulation, or legal requirement that it believes is inconsistent with the Section 254(a) of the Act. This awesome power clearly belongs with the Courts and not distant administrative staffers. As written, it will be extremely difficult for a court to find that the FCC has exceeded its authority. Consequently, with regard to this standard its decisions may in effect be unreviewable.

Equally troublesome is the abuse of discretion standard applied to federal agency actions. Practitioners in administrative law know all too well that the courts will uphold administrative decisions the vast majority of the time. A reversal occurs only when there is a clear abuse of discretion. a condition infrequently found by the Courts.

The bottom line becomes very clear to local governments, such as Los Angeles, and its citizens. Control regarding telecommunications and zoning issues will be exercised by federal officials three thousand miles away. Individuals who know little or nothing about local interests, the important everyday decisions that should be made by local officials and that should be reviewable by local [*S8172] courts, will be made by faceless names in Washington.

In addition, because if the procedural structure of the FCC, the normal right to cross-examine witnesses and their testimony is not present. The right to comment and reply to another interested party's comments theorically permits the FCC to make a fair and impartial judgment. However, the comments are not under oath and the testimony that is filed under penalty of perjury is never is reality tested for truth and accuracy. The practical effect is that anybody may say anything they wish with impunity. The decisionmakers, therefore, may be misled into believing erroneous "facts". This view is not intended to suggest that the courts are the answer for all issues. There exist some practical problems with the courts; they may be too slow and they may lack the technical expertise. However, Section 254(d) appears to effectively eliminate the courts because of the absence of any real or effective review of FCC decisions. Senate Bill 652 must be amended to leave local issues to local government and thereby permit local citizens, local governments and local courts to be active participants in the resolution of local issues.

Finally, the industry has clearly captured the decision making of officials at the FCC. In recent years the voice of local governments and its citizens have been routinely rejected by the FCC and the industry appears to have a lopsided influence.

We recommend that Section 254(d) be eliminated in its entirety. If that is accomplished, violations of S. 652 will be decided in the forum properly equipped to do so-the local Federal Courts.

As an additional note, we wish to comment that section (a) of S. 652 also represents a serious and significant invasion of local government authority over local interests. Most any action taken by local government in this area can be construed as having "the effect of prohibiting" an entity from providing telecommunications services. Surely more precise wording can be developed which would not so significantly erode the power of local government over local matters. Please advise if you would like further comment regarding this section.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

Edward J. Perez,

Assistant City Attorney.

Office of City Attorney,

City and County of San Francisco,

June 12, 1995.

Re Telecommunications Competition and Deregulation Act.

Hon. Dianne Feinstein, U.S. Senate, Washington, DC. Dear Senator Feinstein: I am writing to commend you for sponsoring an amendment to the telecommunications bill to preserve local control over the public rights of way. It is critical to local governments that subsection (d) of proposed 47 U.S.C. Section 254, which would authorize the FCC to preempt state and local authority, be deleted from the bill.

In San Francisco, as in other cities, we welcome the prospect of new telecommunications providers making expanded services available on a competitive basis. However, deregulation only increases the importance of local control over our streets because it brings many new companies seeking to install facilities in our streets.

City laws now require all street excavators-including telecommunications providers-to comply with nondiscriminatory local laws designed to preserve the public health and safety and minimize the costs to the public of repeated street excavation. Throughout the country, such local laws are tailored to the specific characteristics of each local community, including local geography, density of development and the age of public streets and facilities. The language of subsection (d) would severely

undermine local government ability to apply such locally tailored requirements on a uniform basis. Whenever application of routine local requirements interferes with the schedule or convenience of a telecommunications supplier, subsection (d) would authorize the company to seek FCC preemption. To identify just a few examples, my colleague city attorneys and I will have to send an attorney off to Washington every time a telecommunications company challenges our authority to:

(1) Regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts;

(2) Require a company to relocate its facilities to accommodate a public improvement project, like the installation, repair or replacement of water, sewer or public transportation facilities;

(3) Require a company to place facilities in joint trenches owned by the City or another utility company in order to avoid repeated excavation of heavily traveled streets;

(4) Require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;

(5) Require a company to pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work;

(6) Require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;

(7) Require a company to use particular kinds of excavation equipment or techniques suited to local circumstances to minimize the risk of major public health and safety hazards; (8) Enforce local zoning regulations; and

(9) Require a company to indemnify the City against any claims of injury arising from the company's excavation.

All of the requirements described above are routinely imposed by local governments in exercise of our responsibility to manage the public rights of way. Granting special favors to telecommunications suppliers, compared for example to other utility companies, will undermine the uniformity of local law and could dramatically increase the costs to local taxpayers of maintaining public streets.

In these times, when the federal government is asking state and local governments to take on many additional duties, the FCC should not be empowered to interfere in this area of classic local authority. This is especially true because, for many cities, the FCC is a remote, costly and burdensome arena in which to resolve disputes. The courts are well-suited to resolve any disputes that may arise from the "Removal of Barriers to Entry" language of Section 254 without placing heavy burdens on local governments.

I appreciate the leadership you have shown on this difficult issue. Please let me know if I can offer any further assistance with your efforts on behalf of cities.

Very truly yours,

Louise H. Renne,

City Attorney.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I am honored to join my friend from California, Senator Feinstein, in this amendment. This is not the first time we have teamed up together. I think perhaps our background as both being former mayors has allowed us to bring to this position some perspective to help us realize, with regard to local and State governments, how this Federal-State- local partnership really ought to be ordered.

The Senator from California was very helpful when we brought forward the bill, the Unfunded Mandates Reform Act of 1995, which the majority leader had designated Senate bill 1, and which allowed me to team up with the Senator from Ohio,

John Glenn . In March of this year, as you know, Mr. President, that unfunded mandates legislation was signed into law. Part of that new law in essence says that Federal agencies must develop a process to enable elected and other officials of State, local, and tribal units of government to provide input when Federal agencies are developing regulations.

The conference report of that legislation passed overwhelmingly. In the Senate it was 91 to 9. In the House it was 394 to 28.

An overwhelming majority said in essence enough is enough, that the Federal Government must reestablish a partnership with local government. It is very straightforward. This movement toward local empowerment has consistently been expressed in the legislative reform occurring in both Houses of Congress. But I feel, as I think the Senator from California feels, that this provision in this telecommunications bill is causing a slippage back to our old habits. What we have before us in section 254 of the bill before us is a reversal of the positive progress that we have been making.

As the Senator from California pointed out, in subsection (d) the committee has added broad and ambiguous FCC preemption language that states, if the FCC "determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

We are going to give this power to the FCC over the jurisdictions of the

local communities and the State governments. This is a disturbing directive that instructs the Federal Commission to invalidate duly adopted State laws and

local ordinances that the independent Commission may deem inappropriate. This preemption would be generated by a commission that in a majority of cases would be thousands of miles away from the local government jurisdiction that would be affected by their decision.

I know of no one in local government who objects to the language which ensures nondiscriminatory access to the [*S8173] public right of way. But what they do vigorously object to is that this proposed FCC preemption does not allow them the prerogative to manage their right of way in a manner that they deem to be appropriate and in the best interest of their community.

If I may, Mr. President, let me give you an example. When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

I think one of the things that you hear so often if you are in local government or if you tune into the radio talk shows, is when a new street has been paved, within 6 months you see crews out there cutting into that new pavement, and they are putting in a new utility. That is expensive, and it is unnecessary if you can coordinate things. Surely, we do not think that an independent commission in Washington, DC, is going to be able to better coordinate that than the local government in San Francisco or the local government in Boise, ID. It just does not happen.

This proposed preemption is based on two assumptions. First, that it is the role of the Federal Government to tell others what to do; second, that local units of government are not capable or responsible enough to make the right decisions. I reject both of those presumptions.

Like the Senator from California, with the hands-on experience that she has had at the local government level, we realize that Federal solutions do not always meet local problems. You have to take into account the local conditions and the local innovations. These Federal solutions have not worked in the past. They are not working now. They will not work in the future.

So why would we step back with all of the progress that we have been making this congressional session in reordering the partnership between the Federal, the State and the local governments in a working partnership?

This language which introduces expanded FCC jurisdiction into the local decisionmaking process is ill-conceived, and it should not be included in the final language of this important legislation. Our amendment would strike the offending

subsection in its entirety. This would leave control of local right of way matters with local elected officials, which is exactly where it belongs.

The goal of Congress in regulatory reform should be to remove existing Federal roadblocks that limit productivity and creativity and innovation. We should legislate in a manner that enhances Federal- local intergovernmental partnerships for mutually beneficial results. We should not be guilty of imposing new, unnecessary bureaucratic hurdles as has been done in this case.

So, again, I am so proud to join the Senator from California in this effort. We make a good team. This is a worthy effort to team up with because this present preemption needs to be removed from the telecommunications bill. I yield the floor, Mr. President.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I would like to thank the Senator from Idaho for those excellent remarks. I think he hit the nail on the head with respect to the rights of local government, and the way in which this Congress is moving. This preemption sets all of our progress regarding the relationship between Federal and local government back, and hurts cities, counties, and States in the process.

So I want the Senator to know how much I enjoy working with him on this. I thank him very much.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I reluctantly rise in opposition to this amendment from two of my most respected colleagues in the Senate. The issue addressed in this amendment goes to the very heart of S. 652, eliminating barriers to market entry.

In the case of section 254, which I have here in front of me, entitled "Removal of Barriers to Entry," we do preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The actual authority granted to the FCC in subsection (d) is critical to ensuring that State and local authorities do not get in a way that precludes or has the effect of precluding new entry by firms providing new telecommunications services. At the same time, make no mistake about it, the authority granted in subsections (b) and (c) to the State and local authorities respectively in turn protect them. For example, in subsection (c) it says, "Nothing in this section affects the authority of local government to manage the public rights of way."

Mr. President, this is a particularly difficult problem because all of us want to leave authority with State and local government. But this is a deregulatory bill to allow companies to enter and to compete without barriers. If this section were allowed to fall, it could mean that certain requirements would be placed on companies, such as public service projects or certain types of payments of one sort or another for a local universal service, or whatever. We are trying to deregulate the telecommunications markets in the United States. I know it sounds great to say let every city and municipality have a virtual veto power over what is occurring in their area.

Now, it is my strongest feeling that sections (b) and (c) to the State and

local authorities, respectively, are more than sufficient to deal in a fair-handed and balanced manner with legitimate concerns of State and local authority. Sections (b) and (c) take into account State and local government authority, (b) says:

State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

Section (c):

Local Government Authority. Nothing in this section affects the authority of a local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis if the compensation required is publicly disclosed by such Government.

Now, the preemption clause (d) reads as follows:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The intent therefore is to leave protected State regulatory authority, to leave protected local government authority, but there have to be some cases of preemption or a certain city could impose a requirement of some sort or another that would be very anticompetitive, and that is where we come out.

I have joined in a lot of efforts here to ensure that our State and local authority be preserved. And I understand there will possibly be a second-degree amendment. We have worked closely with Senator Hutchison and the city, county, and State officials to achieve this balance. That is where the committee came out.

I feel very strongly that it is a fair balance. It takes into account State regulatory authority, takes into account local government authority. But it also recognizes the need to open up markets, the removal of barriers to entry. In many cases these do become barriers to entry, barriers to competition.

So I rise in reluctant opposition to the amendment.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina. [*S8174]

Mr. HOLLINGS. Mr. President, you have to be sure of foot to be opposing two distinguished former mayors. The Senator from California is the former mayor of San Francisco, and the distinguished Senator from Idaho is a former mayor of Boise. Both had outstanding records.

But let me suggest that what they have read into the preemption section is a requirement and an idea that just does not exist at all. I will have to agree with them in a flash that the Federal Communications Commission has no idea of coordinating, as the Senator from Idaho has outlined, the digging up in front of all of the sidewalks and stores and everything else, putting in the regular necessary conduit, refirming the soil and the sidewalks again in front. We have no idea of the FCC doing it.

Let us tell you how this comes about. Section 254 is the removal of the barriers to entry, and that is exactly the intent of the Congress, and it says no Government in Washington should, well, vote against it. But I think the two distinguished Senators are not objecting to the removal of the barriers to entry. What we are trying to do is say, now, let the games begin, and we do not want the States and the local folks prohibiting or having any effect of prohibiting the ability of any entity to enter interstate or intrastate telecommunications services. When we provided that, the States necessarily came and said, wait a minute, that sounds good, but we have the responsibilities over the public safety and welfare. We have a responsibility along with you with respect to universal service.

So what about that? How are we going to do our job with that overencompassing general section (a) that you have there. So we said, well, right to the point: "Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis"-those are the key words there, the States on a competitively neutral basis, consistent with opening it up-"requirements necessary."

We did not want and had no idea of taking away that basic responsibility for protecting the public safety and welfare and also providing and advancing universal service. So that was written in at the request of the States, and they like it. The mayors came, as you well indicate, and they said we have our rights of way and we have to control-and every mayor must control the rights of way.

So then we wrote in there:

Nothing shall affect the authority of a local government to manage the public rights of way or to acquire fair and reasonable compensation . . . on a competitively neutral and nondiscriminatory basis.

"Competitively neutral and nondiscriminatory basis." Then we said finally, indeed, if they do not do it on a competitively neutral or nondiscriminatory basis, we want the FCC to come in there in an injunction. We do not want a district court here interpreting here and a district court in this hometown and a Federal court in that hometown and another Federal court with a plethora of interpretations and different rulings and everything else. We are trying to get uniformity, understanding, open competition in interstate telecommunications-and intrastate, of course, telecommunications. Now, that was the intent and that is how it is written. And if our distinguished colleagues have a better way to write it, we would be glad and we are open for any suggestion. But somewhere, sometime in this law when you say categorically you are going to remove all the barriers to entry, we went, I say to the Senator, with the experience of the cable TV. I sat around this town-I was in an advantaged section up near the cathedral. I had the cable TV service, but two-thirds of the city of Washington here did not have it for years on end because we know how these councils work. We know how in many a city the cable folks took care of just a couple of influential councilmen, and they would not give service or could give service or run up the price and everything else of that kind.

We have had experience here with the mayors coming and asking us. And this is the response. That particular section (c) is in response to the request of the mayors. If they do not do that, if they put it, not in a competitively neutral basis or if they put it in a discriminatory basis, then who is to enjoin? And we say the FCC should start it. Let us not go through the Administrative Procedures Act. Let us not go through every individual.

Yes, we want those mayors and all to come here and everybody to understand rules are rules and we are going to play by the rules and the rules protect those mayors to develop, to administer, to coordinate. I agree 100 percent, I say to the Senator from Idaho, that the FCC has never performed the job of a city mayor. But they shall and must perform this job here of removing the barriers to entry. And if we do not have them doing it, then I will yield the floor and listen to what suggestion they have. But do not overread the preemption section to other than centralizing the authority and responsibility in the FCC to make sure, like they have in administering all the other rules relative to communications here and all the other entities involved in telecommunications, they have that authority to make sure while the cities got their rights of way, while the States have got their public welfare and public interest sections to administer, that it is done on a nondiscriminatory basis.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I would like to respond to my two friends, the floor managers of this bill, and then I know the Senator from California would also like to respond.

They referenced, of course, section 254. which is removal of barriers to entry. That is the section and that is the key. They stated it: That no State, local statute or regulation or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.

Period. Period. And nothing in this amendment alters that at all. We affirm that. It is my impression, Mr. President, that when it is referenced that section (b), State regulatory authority, yes, the States feel that that language is good; and section (c), local government authority, yes, mayors had something to do with the writing of that language. They feel good about that. But the problem is, then you go on to section (d) which, it is my understanding, came very late in the process. In section (d), there is this line that says: "The Commission shall immediately preempt * * *"

We see this so many times with Federal legislation: On the one hand, we give but, on the other hand, we take it away. In section (b) and section (c) we give, but, by golly, we have section (d) that then says that this Commission will immediately preempt. That is the problem. We are not saying that we should not be held accountable to this. That is why there is no language in this amendment to alter the opening statement of section 254. No problem. It is section (d) that then comes right along and, after everything has been said, preempts and pulls the plug, and that is wrong. We should not do this to our local and State partners. It is absolutely wrong. I yield the floor.